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11 UNITED STATES DISTRICT COURT  
12 SOUTHERN DISTRICT OF CALIFORNIA

13 COMMODITY FUTURES TRADING )  
14 COMMISSION, )

15 Plaintiff, )

16 vs. )

17 WHITE PINE TRUST CORPORATION, a )  
18 California corporation, and RICHARD )  
19 MATTHEWS, an individual, )

20 Defendants. )

Case No.

MEMORANDUM OF LAW IN SUPPORT  
OF PLAINTIFF'S APPLICATION FOR A  
STATUTORY *EX PARTE* RESTRAINING  
ORDER, PRELIMINARY INJUNCTION,  
APPOINTMENT OF A TEMPORARY  
RECEIVER, AND EXPEDITED  
DISCOVERY

FILED UNDER SEAL

21 I.

22 PRELIMINARY STATEMENT

23  
24 Since at least August, 2000, defendants White Pine Trust Corporation (“White Pine”) and  
25 Richard Matthews (“Matthews”) (collectively “defendants”) have been illegally operating a  
26 foreign currency trading firm out of San Diego, California. Through direct solicitations and a  
27 website, defendants have solicited retail customers to trade purported foreign currency contracts  
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1 and foreign currency options contracts. Since at least September 2002, defendants have solicited  
2 a minimum of \$650,000 in customer funds from at least three customers, and upon information  
3 and belief, have solicited millions of additional dollars from hundreds of retail customers for  
4 purposes of purportedly trading foreign currency and foreign currency options contracts.  
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6 To lure customers to trade with White Pine, defendants fraudulently misrepresented how  
7 customers money would be handled and protected, claiming all customer money would be held  
8 in a segregated account and not in White Pine's operating accounts, when in fact defendants  
9 commingled customer money with other monies in at least two corporate operating accounts.  
10 Exhibits ("Ex.") 13, CFTC 00184; Ex. 14, CFTC 00259, Ex. 17 CFTC 00612-613. Defendants  
11 falsely touted the expertise and sophistication of White Pine in trading foreign currency when  
12 defendants had little or no experience trading in the foreign currency markets, and blatantly  
13 posted a false winning trading record for White Pine going back to 1995 even though, by  
14 defendants' own admission, White Pine was created no earlier than 2000. Ex. 1, CFTC 00008.  
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16 Defendants have misappropriated customer funds. Defendants deposit customer funds  
17 into White Pine operating accounts, which defendants then use for purported business expenses  
18 and for personal purposes, including paying for purchases from Saks Fifth Avenue, Royal Maui  
19 Jewelers, Justflowers.com, Hooters' restaurant, and The Men's Warehouse. Ex. 14, CFTC  
20 00288-289. Moreover, checks for large sums of money drawn from these same accounts were  
21 made payable to Matthews personally. In one two-month period in 2004, Matthews cashed  
22 checks payable to himself totaling more than \$230,000 from a single operating account. Ex. 13,  
23 CFTC 00173-178.  
24

25 White Pine has opened and conducted business through at least six separate bank  
26 accounts during its existence. Ex. 6, CFTC 0062; Exs. 14-17. Four of these bank accounts show  
27 total deposits of over \$33 million from 2001 through 2004, and substantial funds flowing out of  
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1 these accounts to pay for personal and business expenses. Exs. 14-17. The enormous amount of  
2 money flowing through the White Pine accounts controlled by Matthews raises concerns that the  
3 defendants are dissipating customer funds.

4 In an attempt to hide this massive fraud and illegal operation, defendants lied to the  
5 federal government. When questioned under oath by staff of the Division of Enforcement of the  
6 plaintiff Commodity Futures Trading Commission about White Pine's activities, defendant  
7 Matthews falsely testified that White Pine was not soliciting customers, had no customers and  
8 held no customer funds. Ex. 1, CFTC 00008-9; 00011; Ex. 2, CFTC 00043. Defendant  
9 Matthews also claimed that White Pine's website represented a business development proposal  
10 that had not been acted upon and was, by his own admission, "fictitious." Ex. 1, CFTC; 00011.  
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13 Through the conduct described above, defendant Matthews has engaged in  
14 misappropriation and the fraudulent solicitation of customer funds and, consequently, violated  
15 Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2002), and Commission Regulations 1.1, 32.9(a) and  
16 (c), 17 C.F.R. §§ 1.1, 32.9(a) and (c) (2004). Matthews is liable for White Pine's violations as a  
17 controlling person of White Pine, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b)(2002).  
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19 Because defendant Matthews was acting as an officer, agent or employee in engaging the  
20 engaging conduct alleged above, White Pine is vicariously liable for violations of Section 4c(b)  
21 of the Act and Commission Regulations 1.1, 32.9(a) and (c) pursuant to Section 2(a)(1)(B) of the  
22 Act, 7 U.S.C. § 2(a)(1)(B) (2002).

23 Because the foreign currency options transactions White Pine purports to offer are not  
24 conducted on or subject to the rules of a designated contract market or foreign board of trade,  
25 White Pine, through its agents and representatives, is engaged in soliciting, or accepting any  
26 order for, or otherwise dealing in, illegal off-exchange options contracts in violation of Section  
27 4c(b) of the Act, 7 U.S.C. § 6c(b) (2002), and Commission Regulation 32.11(a), 17 C.F.R.  
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1 § 32.11(a) (2004). Matthews also is liable for White Pine’s violations as a controlling person of  
2 White Pine, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b)(2002).

3 Unless restrained and enjoined by this Court, the defendants are likely to continue to  
4 engage in the acts and practices alleged in the Complaint and in similar acts and practices, as  
5 more fully described below. Accordingly, pursuant to Section 6c(a) of the Act, 7 U.S.C. § 13a-  
6 1(a) (2001), the Commission brings this action to enjoin such acts and practices, prevent the  
7 dissipation of assets, and compel compliance with the provisions of the Act.  
8

9 To preserve any investor funds still in possession of the defendants and the records of the  
10 defendants’ activities, the Commission seeks a statutory *ex parte* restraining order to prohibit the  
11 defendants or any other person or entity acting in the capacity of their agents or in active concert  
12 or participation with them, who receive actual notice of such order, from: (1) withdrawing,  
13 transferring, removing, dissipating or disposing of defendants’ funds, assets or other property;  
14 and (2) destroying, altering or disposing of, or denying authorized representatives of the  
15 Commission immediate access to the defendants’ and relief defendants’ books, records or  
16 documents.  
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18 Accordingly, the Commission submits this memorandum in support of its motions for a  
19 statutory restraining order and a preliminary injunction against the defendants pursuant to Section 6c  
20 of the Commodity Exchange Act, as amended (“Act”), 7 U.S.C. § 13a-1(a) (2002).  
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## 22 II.

### 23 PARTIES

#### 24 A. Plaintiff

25 The Commodity Futures Trading Commission is an independent federal regulatory agency  
26 that is charged with the administration and enforcement of the Act, 7.U.S.C. §§ 1 *et seq.* (2002), and  
27 the regulations promulgated thereunder. The Commission maintains its principal office at Three  
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1 Lafayette Centre, 1155 21<sup>st</sup> Street, N.W., Washington, D.C. 20581.

2 B. Defendants

3 White Pine Trust Corporation was incorporated on July 25, 2000 in the state of  
4 California. White Pine's operating address and address on state corporate records is 343 4<sup>th</sup>  
5 Ave., Suite 201, San Diego, CA 92101. White Pine has never registered with the Commission in  
6 any capacity.

7  
8 Richard Matthews is self identified as the Founder and Managing Director of White Pine,  
9 and is a signatory on defendant White Pine's operating accounts. Matthews maintains an  
10 address in San Diego, California. From December 1994 through December 1997, Matthews was  
11 registered with the Commission as an Introducing Broker of Global Trading Group, a company  
12 founded by Matthews that solicited retail customers to invest in futures contracts. Ex. 12.  
13 Matthews is not registered at this time with the Commission in any capacity.

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15 III.

16 STATEMENT OF ISSUES

17 A. Whether pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, this Court should  
18 issue a statutory *ex parte* restraining order freezing assets owned or controlled by defendants,  
19 preserve and protect all records owned or controlled by defendants based upon the evidence  
20 presented herein that defendants have defrauded retail customers in connection with foreign  
21 currency options and have offered and/or sold illegal foreign currency options to retail customers  
22 in violation of Section 4c(b) of the Act, 7 U.S.C. § 6c(b) (2002), and Commission Regulations  
23 §§ 1.1, 32.9 and 32.11, 17 C.F.R. §§1.1, 32.9 and 32.11 (2004)?

24  
25 B. Whether this Court should issue a preliminary injunction order against the  
26 defendants based upon the evidence set forth herein demonstrating that the Commission has a  
27 probable success on the merits, *i.e.*, showing that the defendants violated Section 4c(b) of the  
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1 Act and Commission Regulations 1.1, 32.9 and 32.11, and is entitled to a presumption of  
2 irreparable injury?

3 C. Whether this Court should issue an order allowing the Commission to take  
4 expedited discovery and issue an order temporarily sealing the record for a period of 72 hours or  
5 until the defendants receive notice of this action, whichever is earlier?  
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7 IV.

8 STATEMENT OF THE FACTS

9  
10 A. Defendants Cheat And Defraud Retail Customers

11 White Pine is a foreign currency trading firm operating in the San Diego area. Defendant  
12 Matthews is the Founder and Managing Director of White Pines and he conceived of and  
13 established White Pines in 2000 as a foreign currency trading firm. Ex. 1, CFTC 00008-9;  
14 00032-33. Matthews developed the website, [www.whitepinetrust.com](http://www.whitepinetrust.com), and solicited customers  
15 at trade shows nationwide. Ex. 1, CFTC 00008-9; 00018-22; Ex. 3, CFTC 00051. Matthews is  
16 responsible for the overall day-to-day operation of White Pine, is a signatory on White Pine's  
17 operating accounts, and handles customer requests for account withdrawals. Exs.10; 13-17.

18  
19 White Pine's website, at least until recently, along with other advertising and solicitation  
20 materials provided to potential customers, purport to offer customers the opportunity to speculate  
21 in the value of purported foreign currency and foreign currency options. Ex. 7. Defendants offer  
22 to open and manage customer foreign currency accounts, and promise customers steady returns  
23 on their investments while downplaying the risk of loss. Ex. 7, CFTC 00111-114. Through the  
24 website and other solicitation materials, defendants encourage potential customers to invest with  
25 White Pine by creating a false image of trust, legitimacy, longevity, safety and experience.  
26 Indeed, defendants quote from Oliver Wendell Holmes, "Put not your trust in money, but put  
27 your money in trust." Ex. 8, CFTC 00131. As set forth below, defendants created that feeling of  
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1 trust based upon a series of mistruths. Moreover, in a blatant, yet futile effort to cover the fraud  
2 and misappropriation, defendant Matthews lied to the Commission.

3 Specifically, defendants solicit potential customers to invest in White Pine's Pinnacle  
4 Capital Fund, both through attending trade shows nationwide and through its former website.  
5 Ex. 1, CFTC 0018-22; Ex. 7; Ex. 3. CFTC 00051, ¶ 4. Defendants also refer customers to the  
6 website to obtain information concerning their accounts, including obtaining specific account  
7 information. Ex. 3, CFTC 00051, ¶¶ 8-9. Defendants replicated the promotional materials given  
8 to customers on White Pine's website. Exs. 7-8.

9  
10 On White Pine's website, for the Pinnacle Capital Fund, defendants boast an eight-year  
11 cumulative performance record of 610% stemming back to 1995. Ex. 7, CFTC 00121. In the  
12 promotional materials given to customers, for the same period of time defendants purport to have  
13 a cumulative performance record of 591%. Ex. 9, CFTC 00157. On both the website and in the  
14 promotional materials, defendants guarantee that 75% of its customers' investments are  
15 protected from loss each month. Ex. 7, CFTC 00112; Ex. 8, CFTC 00138.

16  
17 White Pine's website also touts the defendants' expertise in managing foreign currency  
18 accounts, promising that "your account manager [is] at least on the same educational plateau as  
19 corporate treasures (sic) and international bankers." Ex. 7, CFTC 00103.

20  
21 However, in sworn testimony taken on January 29, 2004 before the Division of  
22 Enforcement for the Commodity Futures Trading Commission, Matthews unequivocally  
23 admitted that the performance record of White Pine's Pinnacle Capital Fund 19 was fictitious:  
24 "Q. These are just fictitious numbers? A. Yes. The chronology and everything." Ex. 1, CFTC  
25 00031. In fact, Matthews stated at least five times during this testimony that White Pine was a  
26 fictitious company: "Q. So again, this is all fictitious – A. Yes. Absolutely." Ex. 1, CFTC  
27 00037. Matthews further testified that, contrary to defendants' highly proclaimed expertise in  
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1 trading foreign currency options, he knew “little about” foreign currency. Ex. 1, CFTC 00014a.

2 Matthews also unequivocally stated under oath that White Pine did not have any  
3 customers. Ex. 2, CFTC 00043. In fact, White Pine had at least three customers prior to  
4 Matthews’ testimony who invested over \$650,000 with defendants, and upon and information  
5 and belief, based in part upon Matthews’ statements to customers, has as many as 300 customers  
6 who may have invested up to \$33 million with White Pine. Exs. 3-5; Ex. 4, CFTC 00055, ¶ 3.  
7 In soliciting these customers and other potential customers purportedly to trade foreign currency  
8 and foreign currency options on their behalf, through direct solicitation materials and the  
9 website, White Pine made the following misrepresentations of material facts:  
10

- 11 a. All funds are separated and maintained in a “client funds account” and are  
12 not commingled with White Pine’s operating accounts; Ex. 7, CFTC  
13 00107;
- 14 b. All customer accounts are held outside White Pine at regulated broker  
15 dealers; Ex. 7, CFTC 00107;
- 16 c. White Pine has been in the business for eight years with a cumulative  
17 performance record of 591%, covering the time period of 1995 to 2004;  
18 and Ex. 9, CFTC 00157;
- 19 d. White Pine account managers have specialized expertise in trading foreign  
20 currency options. Ex. 7, CFTC 00105.

21 These representations create the impression that White Pine is a legitimate firm.

22 However, these statements are false, in that:

- 23 a. Customer funds are neither separated nor maintained in the clients’ name;  
24 rather, funds are deposited into operating accounts in White Pine’s name  
25 or otherwise commingled with other funds, where some funds are  
26 misappropriated and used for business and personal expenses; Ex. 13,  
27 CFTC 00184; Ex. 14, CFTC 00259, Ex. 17 CFTC 00612-613.
- 28 b. As demonstrated above, White Pine was not in existence in 1995-1999,  
since it was incorporated in July 2000; Ex. 1, CFTC 00008; and

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c. As demonstrated above, Matthews has little knowledge of trading foreign currency options. Ex. 1, CFTC 00014a.

The bank records show that defendants deposited customer funds into operating accounts, which they used to pay for defendants’ personal and business expenses. In a two-month period in 2004, from the same account in which Matthews deposited customer funds, Matthews wrote personal checks to himself totaling over \$230,000. Ex. 17, CFCT 00542; 00547-48; 00550-551; 00557. In a two-month period in 2003 from a different operating account, Matthews wrote other checks for personal expenditures, including a check to Royal Maui Jewelers for \$26,883.63 and a check to Nieman Marcus totaling \$3,568.72. Ex. 13, CFTC 00179-180.

The bank records from a different White Pine’s operating account shows that, in a ten month period from February through December, 2003, defendants spent \$6.9 million on personal and possible business items such as:

6/10/2003	\$1,281.58	Dady’O Nightclub, Cancun
6/11/2003	\$1,249.20	Dady’O Nightclub, Cancun
6/12/2003	\$1,050.56	Royal Maui Jewelers, San Diego
6/19/2003	\$1,190.00	Gary’s Tux Shop, San Diego
6/23/2003	\$3,800.00	Belle-Maision Antiques, San Diego
7/10/2003	\$3,994.08	Auto Europe Car Rental
7/15/2003	\$4,238.23	Le Scorpion Art Gallery, France
7/22/2003	\$4,141.46	Pottery Barn
7/28/2003	\$3,443.83	Décor Furniture
8/18/2003	\$6,382.00	NFL – San Diego Chargers
9/12/2003	\$8,837.78	Four Seasons Hotel, San Francisco
11/26/2003	\$200,000.00	Cash Withdrawal – Pacific Beach, CA
12/11/2003	\$2,754.11	Saks Fifth Avenue
12/16/2003	\$250,000.00	Cash Withdrawal – San Diego, CA

Ex. 16. Although the Commission does not know at this time exactly what portion, if any, of the \$6.9 million in this particular account was customer money, upon information and belief, including defendants’ own representations to one customer that White Pine had at least 300 customers, and wire transfers and checks that appear likely to be from customers, the Commission contends that at least some, if not all, of this money is likely to be from defrauded

1 customers.

2           Indeed, although the three known customers ultimately received their full investments  
3 plus purported profits back from the defendants, the Commission is concerned that the  
4 defendants are dissipating other customer funds. The Commission issued a subpoena to White  
5 Pine on October 24, 2003 requesting, among other things, defendants' promotional materials and  
6 business records. Ex. 2. White Pine's bank records show a withdrawal of \$1.4 million in cash  
7 from a White Pine operating account in November, 2003, shortly after defendants received the  
8 Commission's subpoena. Ex. 6, CFTC 00062. Moreover the large cash flow through  
9 defendants' operating funds is suggestive that defendants may be paying earlier customers with  
10 later customer funds in a manner akin to a Ponzi scheme.

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13 B.       Some Of The Purported Foreign Currency Transactions Defendants  
          Offer Are Illegal Off-Exchange Foreign Currency Options

14           Since at least February 2003, White Pine has engaged in an elaborate scheme to defraud  
15 retail customers. White Pine's promotional materials and account opening documents describe  
16 an investment opportunity to profit based upon the fluctuations in the relative values of foreign  
17 currencies. Exs. 7-9. During the relevant period, through written materials provided to  
18 customers and prospective customers, White Pine affirmatively stated that "We also trade in FX  
19 options." Ex. 7, CFTC 00112. The same promotional materials expand upon this statement and  
20 explain how White Pine uses options as a hedging strategy purportedly to minimize the  
21 investment risk faced by prospective investors. Ex. 7, CFTC 00112-114; Ex 8, CFTC 00139-  
22 140.

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25           White Pine customers sent money directly to White Pine. Customers either wired money  
26 directly into White Pine's operating accounts, or wrote personal checks made out to White Pines  
27 Trust Corporation, which Matthews then deposited into White Pine's operating accounts. Exs.  
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1 13-17. Defendants gave customers promotional materials and referred them to White Pine’s  
2 website so customers could track their accounts. Exs. 3-5. Customers also received monthly  
3 account statements on White Pine’s Pinnacle Capital Fund letterhead. Ex. 11. The customer  
4 account statements did not indicate the specific trading executed, where the purported trading  
5 occurred, or where White Pine had deposited the customer funds. *Id.*  
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7 The foreign currency options contracts offered by White Pine have not been conducted or  
8 executed on or subject to the rules of a contract market, or a foreign board of trade. White Pine  
9 is not an appropriate counter-party under the Act for the alleged transactions herein, and certain  
10 customers solicited by White Pine were not eligible contract participants.  
11

12 V.

13 JURISDICTION

14 The Commission is an independent federal regulatory agency charged with responsibility  
15 for administering and enforcing the provisions of the Commodity Exchange Act (“Act” or  
16 “CEA”), as amended, 7 U.S.C. §§ 1 *et seq.* (2000) and the regulations promulgated thereunder,  
17 17 C.F.R. §§ 1 *et seq.* (2002). The basis for subject matter jurisdiction in the United States  
18 District Court for the Southern District of California is Section 6c of the Commodity Exchange  
19 Act (“Act” or “CEA”), 7 U.S.C. § 13a-1. Section 6c of the Act authorizes the Commission to  
20 bring an action in the proper United States district court against any person whenever it shall  
21 appear that such person has engaged, is engaging, or is about to engage in any act or practice  
22 constituting a violation of any provision of the Act or any rule, regulation or order thereunder.  
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25 The Act and Commission Regulations prohibits fraud in connection with any order to  
26 make, or the making of, any contract of sale for any commodity option transaction. 7 U.S.C.  
27 § 6c(b)(2002), 17 C.F.R. § 32.9 (2004). The Act also provides that the Commission has  
28 jurisdiction over certain retail transactions in “off exchange” foreign currency futures and

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1 options contracts entered into between retail customers and ineligible counterparties. 7 U.S.C.  
2 § 2(c)(2)(A), (B) and (C).

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4 VI.

5 ARGUMENT

6 A. The Defendants Cheated And Defrauded Investors  
7 By Misappropriating Investor Funds, And By Falsely  
8 Misrepresenting Defendants' Performance Record And Trading Expertise

9 Section 4c(b) of the Act, read together with Commission Regulation 32.9(a) and (c),  
10 prohibits cheating and defrauding or attempting to cheat or to defraud or willfully deceiving or  
11 attempting to deceive other persons in connection with an offer to enter into, the entry into, the  
12 confirmation of the execution of, or the maintenance of, commodity option transactions. 7 U.S.C. §  
13 6c(b)(2002), 17 C.F.R. § 32.9(a) and (c)(2004). Commission Regulation 1.1, 17 C.F.R. § 1.1  
14 (2004), similarly prohibits such conduct in connection with foreign currency contracts.

15 In order to establish fraud, the Commission must prove that (1) a misrepresentation,  
16 misleading statement, or a deceptive omission was made; (2) by the defendant whose conduct  
17 involves “highly unreasonable omissions or misrepresentations ....that present a danger of  
18 misleading [customers] which is either known to the [d]efendant, or so obvious that [d]efendant  
19 must have been aware of it”, or, in other words, scienter; and (3) that the misrepresentation was  
20 material. *Commodity Futures Trading Commission v. R.J. Fitzgerald & Co., Inc.*, 310 F.3d  
21 1321, 1328-29 (11<sup>th</sup> Cir. 2002) (internal citations omitted).

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23  
24 Scienter may be established by showing that: (1) the defendants knew their  
25 misrepresentations were false and calculated to cause harm; or (2) the defendants made the  
26 representations with a reckless disregard for their truth or falsity. The scienter element is  
27 established when a person’s acts are performed “with knowledge of their nature and character.”  
28

1 *Wasnick v. Refco, Inc.*, 911 F.2d. 345, 348 (9<sup>th</sup> Cir. 1990). The Commission must demonstrate  
2 only that the defendants' actions were "intentional as opposed to accidental." *Lawrence v.*  
3 *Commodity Futures Trading Commission*, 759 F. 2d 767, 773 (9<sup>th</sup> Cir. 1985); *Hammond v. Smith*  
4 *Barney, Harris Upham & Co.*, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 24,617  
5 at 36,657-36,659 (CFTC March 1, 1990) (scienter is a necessary element to establish fraud).  
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7 A statement is material if "it is substantially likely that a reasonable customer would  
8 consider the matter important in making an investment decision." *Sudol v. Shearson Loeb*  
9 *Rhoades, Inc.*, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,748 at 31,119  
10 (CFTC Sept. 30, 1985) (citing *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).  
11

12 False representations regarding profit potential are material. *See, e.g., Miller v. Commodity*  
13 *Futures Trading Commission*, 197 F.3d. 1227, 1229, 1233 (9<sup>th</sup> Cir. 1999), *aff'g in part, rev'g in*  
14 *part, In Re Miller Commodity Futures Trading Commission v. U.S. Metals Depository Co.*, 468  
15 F. Supp. 1149, 1160 (S.D. N.Y. 1979). "When the language of a solicitation obscures the  
16 important distinction between the possibility of substantial profit and the probability it will be  
17 earned, it is likely to be materially misleading to customers." *In re JCC Corp.*, [1992-1994  
18 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 26,080 at 41,576 n. 23 (CFTC May 12, 1994).  
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20 1. Defendants Misappropriated Customer Funds

21 White Pine's solicitation materials state explicitly that, "Here in the U.S. WPT [White  
22 Pine Trust] client funds are held in a segregated CFA (client funds account) and are not  
23 commingled with WPT's operating accounts." Ex. 7; CFTC 00107. Despite this representation,  
24 defendants deposited \$650,000 of customer funds into White Pine's operating accounts. Exs. 3-  
25 5; Ex 13, CFTC 00184; Ex. 14, CFTC 00259, Ex. 17 CFTC 00612-613. Defendants used the  
26 accounts into which customer money was deposit to pay for, among other things, business  
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1 expenses, travel and jewelry. Exs. 14-17. Through these actions, defendants misappropriated  
2 customer funds.

3 Defendants' misappropriation of funds entrusted to them for trading purposes is "willful  
4 and blatant fraudulent activity" that clearly violates Section 4c(b) of the Act. *Commodity*  
5 *Futures Trading Commission v. Noble Wealth Data Info. Serv., Inc.*, 90 F. Supp. 2d at 687  
6 (defendants defrauded investors by diverting investor funds for operating expenses and personal  
7 use); *Commodity Futures Trading Commission v. Skorupskas*, 605 F. Supp. 923, 932 (E.D. Mich.  
8 1985) (defendant misappropriated customer funds entrusted to her by soliciting investor funds  
9 for trading and then trading only a small percentage of those funds, while disbursing the rest of  
10 the funds to other investors, herself, and to her family); *In re Lincolnwood Commodities, Inc.*,  
11 [1982-1984 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,986 at 28,255 (1984)  
12 (Commission affirmed holding that defendant violated Act when he "diverted to his own use  
13 funds entrusted to him by or on behalf of his customers"); *Commodity Futures Trading*  
14 *Commission v. Muller*, 570 F.2d 1296 (5th Cir. 1978) (preliminary injunction affirmed where the  
15 Commission made a *prima facie* showing that defendant had misappropriated customer funds in  
16 violation of Act).  
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20 2. Defendants Falsely Misrepresented Their  
21 Performance Record And Trading Expertise

22 The defendants also violated Section 4c(b) of the Act and Regulation 32.9 by falsely  
23 touting a cumulative eight-year record from 1995-2003 of 610% on their website for White  
24 Pine's Pinnacle Capital Fund, when, by Matthews own admission, White Pine did not exist prior  
25 to 2000. Ex. 1, CFTC 00014a; Ex. 7, CFTC 00121. In the solicitation materials sent to  
26 customers, defendants claimed that this same fund achieved a 591% rate of return over the same  
27 time period. Ex. 9, CFTC 00157. Additionally, although the solicitation materials given to  
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1 customers tout defendants' expertise in trading foreign currency, Matthews testified under oath  
2 that he knew "little about" foreign currency. Ex. 1, CFTC 00014a.

3 Such misrepresentations concerning White Pine's trading record, expertise, and the  
4 segregation of customer accounts described in the preceding section are material and constitute  
5 fraud in violation of Sections 4c(b) the Act and Regulation 32.9(a) and (c), 7 U.S.C.

6 § 6c(b)(2002), 17 C.F.R. § 32.9(a) and (c)(2004). *See, e.g., Commodity Futures Trading*  
7 *Commission v. Commonwealth Financial Group, Inc.*, 874 F. Supp. 1345, 1353-54 (S.D. Fla.  
8 1994) (misrepresentations regarding the trading record and experience of a firm or broker are  
9 fraudulent because past success and experience are material factors to reasonable customers);  
10 *Commodity Futures Trading Commission v. Crown Colony Commodity Options, Ltd.*, 434 F.  
11 Supp. 911, 919 (S.D.N.Y. 1977) (misrepresentations concerning profit potential); *Commodity*  
12 *Futures Trading Commission v. J.S. Love & Associates Options, Ltd.*, 422 F. Supp 652, 655  
13 (S.D.N.Y. 1976) (misrepresentations concerning profit potential and the trading experience of  
14 account executives); *Commodity Futures Trading Commission v. U.S. Metals Depository Co.*,  
15 468 F. Supp. 1149, 1160 (S.D.N.Y. 1979) (misrepresentations regarding profitability of  
16 investment).

17 Defendants made these false solicitation claims with scienter. Matthews admitted under  
18 oath that defendants' cumulative performance record and touted expertise was "fictitious."  
19 Defendants' actions involve "highly unreasonable omissions or misrepresentations that involve  
20 not merely simple or inexcusable negligence, but an extreme departure from the standards of  
21 ordinary care, and that present a danger of misleading [customers] which is either known to the  
22 defendant or is so obvious that the defendant must have been aware of it." *Messer v. E.F. Hutton*  
23 *& Co*, 847 F.2d at 678.

24 Under Section 2(a)(1)(B) of the Act the "act, omission, or failure of any official, agent, or  
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1 other person acting for any individual, association, partnership, corporation, or trust within the  
2 scope of his employment or office shall be deemed the act, omission, or failure of such  
3 individual, association, partnership, corporation, or trust, as well as of such official agent or  
4 other person.” See 7 U.S.C. § 2(a)(1)(B) (2002). Because Matthews engaged in the fraudulent  
5 misappropriation of investor funds and solicitation fraud while acting as White Pine’s agent,  
6 White Pine is vicariously liable for violations of Section 4c(b) of the Act and Commission  
7 Regulations pursuant to Section 2(a)(1)(B) of the Act.  
8

9 For the same reasons outlined above, defendants’ repeated misrepresentations to  
10 customers and their misappropriation of funds also violate the antifraud provision of  
11 Commission Regulation 1.1, 17 C.F.R. § 1.1 (2004).  
12

13 B. Defendants Offered To Enter Into Illegal Off-Exchange Foreign Currency  
14 Options Contracts In Violation Of Section 4c(b) Of The Act And Regulation  
32.11

15 Section 4c(b) of the Act, 7 U.S.C. § 6c(b), read together with Regulation 32.11(a), 17 C.F.R.  
16 § 32.11(a)(2004), makes it unlawful to solicit and/or accept orders for, and/or accepted money,  
17 securities or property in connection with the purchase and sale of commodity options when such  
18 transactions have not been conducted or executed on or subject to the rules of a contract market,  
19 or a foreign board of trade.<sup>1</sup>  
20

21 In their solicitations and on customer account statements, the defendants do not disclose  
22 the name of any counterparty or third party through or with whom they will be trading. Exs. 7-9;  
23 11. Instead, the defendants accept funds in the name of White Pine and deposit these funds into  
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25 <sup>1</sup> Section 2(c)(2)(B)(i) of the Commodity Futures Modernization Act (“CFMA”), Appendix E,  
26 to Public L. No. 106-554, 114 Stat. 2763 (2000), provides that the Commission shall have  
27 jurisdiction over options contracts on foreign currency, so long as the option is “offered to, or  
28 entered into with, a person that is not an eligible contract participant” and the counterparty to the  
option, or the person offering to be the counterparty, is not a regulated entity, as defined in the  
CFMA. The customers in this case are not eligible contract participants and White Pine is not a

1 White Pine accounts. Ex. 13, CFTC 00183-184; Ex. 17, CFTC 00572-647. Defendants issue  
2 account statements in the name of White Pine, which ostensibly show realized trading gains but  
3 do not identify any entity as a possible counterparty, except White Pine. Ex. 11.

4 Accordingly, the evidence establishes that White Pine is acting as the counterparty to any  
5 purported transactions with customers. Because White Pine is not a proper counterparty<sup>2</sup> to offer  
6 foreign currency options contracts to retail customers under the Act, and the purported  
7 transactions are not conducted or executed on or subject to the rules of a contract market or a  
8 foreign board of trade, White Pine is operating in violation of Section 4c(b) of the Act and  
9 Commission Regulation 32.11(a), 7 U.S.C. § 6c(b), and Regulation 32.11(a), 17 C.F.R.  
10 § 32.11(a) (2004).

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12  
13 C. Matthews Is Liable As A Controlling Person Of White Pine

14 As the owner and President of White Pine, Matthews is a controlling person of White  
15 Pine and thus, liable for White Pine's violations of Section 4c(b) of the Act and Commission  
16 Regulations 1.1, 32.9 and 32.11, pursuant to Section 13(b) of the Act, 7 U.S.C. § 13c(b).<sup>3</sup> To be  
17 liable as a controlling person, a defendant must have general control over the operation of the  
18  
19 appropriate counterparty pursuant to Section 2(c)(2)(B) of the Act. *See* 7 U.S.C. § 2(c)(2)(B).

20 <sup>2</sup> Section 2(c)(2)(B)(ii) defines a counterparty as: (I) a financial institution; (II) a broker or  
21 dealer registered under section 15(b) or 15 (C) of the Securities Exchange Act of 1934 (15  
22 U.S.C. § 78o(b)) or a futures commission merchant registered under this Act; (III) an associated  
23 person of a broker dealer registered under section 15(b) or 15C of the Securities Exchange Act of  
24 1934, or an affiliated person of a futures commission merchant registered under this Act; (IV) an  
25 insurance company described in section 1a(12)(A)(ii) of this Act, or a regulated subsidiary or  
affiliate of such an insurance company; (V) a financial holding company (as defined in section 2  
of the Bank Holding Company Act of 1956); or (VI) an investment bank holding company (as  
defined in section 17(i) of the Securities Exchange Act 1934). 7 U.S.C. § 2(c)(2)(B)(ii)(2002).

26 <sup>3</sup> Pursuant to Section 13(b) of the Act, “[a]ny person who, directly or indirectly, controls any  
27 person who has violated any provision of this Act...may be held liable for such violation in any  
28 action brought by the Commission to the same extent as such controlled person. In such action,  
the Commission has the burden of proving that the controlling person did not act in good faith  
or knowingly induced, directly or indirectly, the act or acts constituting the violation.”

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entity principally liable and either knowingly induce, directly or indirectly, the violative acts or fail to act in good faith. *Monieson v. Commodity Futures Trading Commission*, 996 F. 2d 852,

1 858 (7th Cir. 1993) (chairman of board liable as controlling person for failure to supervise  
2 brokers).

3 Matthews satisfies these criteria with respect to White Pine. In addition to having  
4 general control over White Pine and having knowledge of the violative activities of White Pine's  
5 business, Matthews promoted and participated in such activities and is a signatory on White  
6 Pine's operating accounts; indeed, he is the person with White Pine who defrauded the  
7 customers. Thus, Matthews knowingly induced the violations of Section 4c(b) of the Act and  
8 Regulations for which White Pine is charged in this matter, or failed to act in a good faith  
9 manner, and therefore, he is liable as a controlling person for those violations.  
10

11 D. Section 6c Of The Act Authorizes The Court  
12 To Grant The Requested Relief *Ex Parte*

13 Recognizing that notice to defendants may "result in the destruction of books and records  
14 and the dissipation of customer funds," Section 6c(a) of the Act authorizes courts to issue the  
15 requested relief *ex parte* in order "to prevent possible removal or destruction of potential  
16 evidence or other impediments to legitimate law enforcement activities and to prohibit  
17 movement or disposal of funds, assets, and other property which may be subject to lawful claims  
18 of customers." H.R. Rep. No. 97-565, at 53-54, 93 (1982), *reprinted in* 1982 U.S.C.C.A.N.  
19 3871, 3902-03, 3942. Such relief will "ensure that the court maintains jurisdiction over [the  
20 defendants'] assets, in order to allow the court the opportunity to determine later whether  
21 disgorgement of illegally acquired profits is appropriate." *Commodity Futures Trading*  
22 *Commission v. Morgan, Harris & Scott, Ltd.*, 484 F. Supp. 669, 679 (S.D.N.Y. 1979).  
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25 *Ex parte* relief is particularly important in this case where notice to the defendants will  
26 most likely result in a further dissipation of customer funds. The Commission issued a subpoena  
27 to White Pine on October 24, 2003 requesting, among other things, defendants' promotional  
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1 materials and business records. Ex. 2. Defendants responded to the Commission's subpoena by  
2 falsely stating that White Pine was a fictitious company with no business records or customers.  
3 *Id.* However, White Pine's bank records show a withdrawal of \$1.4 million in cash from a White  
4 Pine operating account in November, 2003, shortly after defendants received the Commission's  
5 subpoena. Ex. 6, CFTC 00062, ¶ 5. Therefore, any additional notice to defendants at this time is  
6 likely to trigger an additional withdrawal of assets from defendants' accounts.  
7

8 An asset freeze is also appropriate where, as in this case, the Commission seeks  
9 disgorgement and restitution.<sup>4</sup> See *Commodity Futures Trading Commission v. Trending Cycles*  
10 *for Commodities, Inc.*, [1980-1982 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 21,013 at  
11 23,970 (S.D. Fla. Mar. 17, 1980). As set forth in the accompanying papers, the Commission  
12 seeks an asset freeze for all accounts owned and controlled by the defendants.  
13

14 Furthermore, because it appears that the defendants own and control at least two bank or  
15 trading accounts located offshore, the proposed restraining order requires the defendants to  
16 provide an accounting of and repatriate their foreign-held assets. See *SEC v. Bankers Alliance*  
17 *Corp.*, 881 F. Supp. 673 (D.D.C. 1995) (promoters of investment scheme held in contempt for  
18 failure to disclose location and disposition of investor funds and for failure to repatriate funds  
19 collected from investors which had been sent overseas). The defendants also should be required  
20 to provide the Commission with signed consent forms that will enable the Commission to obtain  
21 full disclosure of foreign financial information. "An order to compel defendants to sign a  
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23  
24 <sup>4</sup> Indeed, in connection with a nationwide crackdown on foreign currency scams, a number of  
25 district courts have issued statutory *ex parte* orders in cases like this case which involved  
26 entities engaged in fraud, the offering of illegal foreign currency futures and options and the  
27 misappropriation of customer funds. See *e.g. Commodity Futures Trading Commission v.*  
28 *Rego Gainer Financial Inc. et al.*, No. 02-1417 DT(Mcx) (C.D.Ca. *ex parte* order entered  
February 19, 2002); *Commodity Futures Trading Commission v. Fintrex, et al.*, No. 01-0697  
(C.D.Ca. *ex parte* order entered August 2001); *Commodity Futures Trading Commission v.*  
*International Financial Services, Inc.*, No. 02-CIV-5497-GEL (S.D.N.Y. *ex parte* order

1 consent form is a permissible method of obtaining that discoverable information in a civil  
2 context, provided that the form of the consent does not abrogate defendants' Fifth Amendment or  
3 due process rights." *SEC v. College Bound, Inc.*, 155 F.R.D. 1, 2 (D.D.C. 1994) (citations  
4 omitted).

5  
6 An order prohibiting the destruction of records and granting the Commission access to  
7 inspect and copy records will allow the Commission to identify the defendants' assets and  
8 determine the identity of the victims of the defendants' scheme. The Commission seeks access  
9 to those books and records of White Pine as well as Matthews wherever they may be located.  
10 Given the ease of destroying documents, defendants' records must be preserved at the very  
11 outset of litigation for there to be a meaningful opportunity to locate and recover customer funds  
12 and to determine the scope of the wrongs perpetrated by the defendants' fraudulent scheme. *See*  
13 *Clothier*, 788 F. Supp. at 493. Preserving these records also is critical to performing the  
14 necessary accounting of defendants' assets and liabilities and ascertaining the nature and scope  
15 of the defendants' scheme. *See Commodity Futures Trading Commission v. Co Petro Marketing*  
16 *Group*, 680 F.2d 573, 583 (9th Cir. 1982). Such relief will "preserve the *status quo* while an  
17 investigation is conducted to clarify the sources of various funds." *Commodity Futures Trading*  
18 *Commission v. Morgan, Harris & Scott*, 484 F. Supp. at 678. Moreover, a freeze also maintains  
19 the court's jurisdiction over the assets when disgorgement or restitution is ordered. *See*  
20 *Commodity Futures Trading Commission v. American Metal Exchange Corp.*, 693 F. Supp. 168,  
21 196 (D.N.J. 1988).

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23  
24 E. The Evidence Meets The Standard For Entry Of A Preliminary Injunction

25 Section 6c(b) of the Act provides in pertinent part that "[u]pon a proper showing, a...  
26 temporary injunction... shall be granted without bond." In the Ninth Circuit, the general standard  
27

1 for obtaining a preliminary injunction provides that: “the moving party must show either (1) a  
2 combination of probable success on the merits and the possibility of irreparable injury or (2) that  
3 serious questions are raised and the balance of hardships tips sharply in its favor.” *U.S. v. Nutri-*  
4 *Cology, Inc.*, 982 F.2d 394, 398 (9th Cir. 1992). However, unlike private actions for equitable  
5 relief, a Commission action for injunctive relief is a creature of statute. “The function of a court  
6 in deciding whether to issue an injunction authorized by a statute of the United States to enforce  
7 and implement Congressional policy is a different one from that of the court when weighing  
8 claims of two private litigants.” *U.S. v. Odessa Union Warehouse Co-op*, 833 F.2d 172, 174-75  
9 (9th Cir. 1987).  
10

11 In the *Odessa* decision the Ninth Circuit Court reversed the district court’s denial of a  
12 motion for preliminary injunction in a case where the United States, as the moving party, had  
13 presented uncontested evidence that the defendant was in continuing violation of the Food, Drug  
14 and Cosmetic Act. The Ninth Circuit held that, in such cases of statutory violations, the  
15 government is entitled to a presumption that it would suffer irreparable injury if its motion were  
16 denied. *Id.* at 175-76.  
17

18 The Ninth Circuit distinguished the *Odessa* decision in *U.S. v. Nutri-Cology*, a case in  
19 which the government, in moving for entry of a preliminary injunction, failed to show that it was  
20 likely to prevail on the merits. Because the Government had made merely “a colorable showing  
21 of a violation,” it was “not entitled to a presumption, rebuttable or otherwise, of irreparable  
22 injury.” *Nutri-Cology*, 982 F.2d at 398. In contrast, the Government in *Odessa* had shown an  
23 “undisputed statutory violation” and therefore, was entitled a presumption of irreparable injury.  
24  
25 *Odessa*, 833 F.2d at 176.  
26

27 Similar to the Government in *Odessa*, the Commission has submitted clear evidence of a  
28 statutory violation in this case. The law provides that irreparable injury arising out of the

1 defendants' ongoing fraud and continuing sale of illegal foreign currency options contracts is  
2 presumed, and an order of preliminary injunction is, therefore, appropriate.

3 F. Expedited Discovery Is Appropriate To Enable  
4 The Commission To Fulfill Its Statutory Duties

5 The Commission also moves this Court for an order granting expedited discovery for the  
6 purpose of ascertaining defendants' assets and the identity of White Pine's customers. Expedited  
7 discovery, in advance of that provided by Rule 26 of the Federal Rules of Civil Procedure, is  
8 necessary to enable the Commission to fulfill its statutory duties. Specifically, discovery of  
9 defendants' complete assets and White Pine's customers will enable the Commission to protect  
10 White Pine's customers from further loss and damage by ensuring that the defendants are  
11 complying fully with the Court's restraining order.  
12

13 In similar cases, courts have granted plaintiff's request for expedited discovery. *See, e.g.,*  
14 *Commodity Futures Trading Commission v. DBS, Inc. et al.*, No. C-031379 – VRW (N.D.Ca.  
15 April 3, 2003); *Commodity Futures Trading Commission v. Chilcott et al.*, 2002 WL 1455345  
16 (M.D. Fla.) (granting the Commission's request for expedited discovery in addition to issuing an  
17 ex parte restraining order freezing the defendants' assets); *Commodity Futures Trading*  
18 *Commission v. Luger*, 2002 WL 1789768 (S.D. Fla.) (same); *Commodity Futures Trading*  
19 *Commission v. First Bristol Group, Inc.*, 2002 WL 31357411 (S.D. Fla.) (same).  
20

21 G. Appointment Of A Receiver

22 Whether a receiver shall be appointed is a matter within the discretion of the court, and is  
23 appropriate where, as in this case, it is necessary to protect the public interest. *Morgan, Harris*,  
24 484 F. Supp. at 677. *Cf. SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d Cir.  
25 1972) (courts repeatedly have upheld the appointment of receivers to effectuate the purposes of  
26 the federal securities laws). A receiver investigates the defendants' activities, ascertains the  
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1 defendants' financial status and the identity of investors, and prevents diversion or waste of the  
2 defendants' assets to the detriment of customers. *Id.*; *American Metal Exch. Corp.*, 693 F. Supp.  
3 168, 196 (D.N.J. 1988).

4 In this matter, the appointment of a receiver is necessary to prevent defendants from  
5 dissipating their assets. As explained above, the Commission is aware of at least \$33 million  
6 that flowed through the defendants' accounts in the preceding three years. Additionally, a 48-  
7 foot yacht, the "Tahara'a II," berthed in San Diego, California, is registered in White Pine's  
8 name, and is under the control of defendant Matthews. Ex. 18. Moreover, upon information and  
9 belief, based upon purchases reflected in defendants' bank records, Matthews has control over  
10 additional significant physical assets, including expensive artwork, jewelry, and antiques. Exs.  
11 14-17. A receiver, therefore, is necessary to protect the public interest by monitoring and  
12 protecting these assets.  
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15 VII.

16 STATEMENT OF RELIEF SOUGHT

17 For the reasons set forth in this memorandum, the Commission respectfully requests that  
18 this Court (1) enter an *ex parte* statutory restraining order freezing defendants' assets and  
19 preserving records; (2) grant leave to conduct expedited discovery; (3) appoint a temporary  
20 receiver; and (4) subsequently grant the Commission's motion for a preliminary injunction.  
21

22 October 19, 2004

Respectfully submitted,

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James H. Holl, III  
Rachel Entman  
Erin E. Vespe  
26 Attorneys for Plaintiff  
27 Commodity Futures Trading Commission  
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